IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

TERRY LEWIS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Wayne County
No. 14165 Robert Holloway, Judge

No. M2007-01616-CCA-R3-HC - Filed November 14, 2007

This matter is before the Court upon the State's motion to dismiss or in the alternative to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20, Rules of the Court of Criminal Appeals. Petitioner has appealed the trial court's order dismissing his petition for habeas corpus relief in which Petitioner alleged that the district attorney's closing argument illegally amended the indictment; that count three of the indictment was constructively amended because the jury was allowed to convict him on a factual basis that effectively modified an element of the charged offense; and that the indictment for robbery did not cite a statute. Upon a review of the record in this case, we are persuaded that the trial court was correct in dismissing the petition for habeas corpus relief without a hearing and without appointment of counsel and that this case meets the criteria for affirmance pursuant to Rule 20, Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted, and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

Terry Lewis, Pro Se, Clifton, Tennessee

Robert E. Cooper, Jr., Attorney General & Reporter; J. Ross Dyer, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

Petitioner was convicted of first degree premeditated murder, first degree felony murder and attempted robbery. *State v. Lewis*, 36 S.W.3d 88, 91 (Tenn. Crim. App. 2000). The murder convictions merged into one conviction for first degree murder. *Id.* at 93. As a result of his convictions, Petitioner received a life sentence in the Department of Correction. *Id.* Petitioner

instituted a direct appeal of his convictions in which he argued: (1) the evidence presented at trial did not sufficiently support his convictions; (2) the attempted robbery count of the indictment did not sufficiently allege attempt; (3) the trial court improperly denied his motion to suppress his statement; and (4) the trial court should have instructed the jury on attempted theft as a lesser-included offense of attempted robbery. *Id.* at 91. On appeal, this Court affirmed the judgment of the trial court, but remanded the matter for correction of the judgment form on the robbery charge, because the record revealed that Petitioner was convicted of attempted robbery, the Class D felony, not attempted aggravated robbery, the Class C felony, as indicated on the judgment form. *Id.* at 94.

Subsequently, Petitioner filed a petition for writ of habeas corpus. In the petition, Petitioner alleged: (1) the district attorney's closing argument "constituted an impermissible constructive amendment of count one of the indictment [for] felony murder in which the jury rendered a defective verdict of premeditated murder" which resulted in a "void and unconstitutional" conviction; (2) the trial court lacked subject matter jurisdiction to impose a conviction because the indictment for robbery did not contain a cite to any pertinent robbery statute; and (3) "count three of the indictment [for] premeditated murder was constructively amended in that the jury was permitted to convict the Petitioner upon a factual basis that effectively modified an essential element of the offense charged." The State filed a motion to dismiss the petition, which was granted by the trial court. Petitioner filed a timely notice of appeal. On appeal, Petitioner contends that the trial court erred in dismissing his petition without appointing counsel and conducting an evidentiary hearing on the merits of the petition.

Analysis

A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). However, if after a review of the habeas petitioner's filings the trial court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a trial court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App. at Jackson, Mar. 11, 1998).

A petitioner has the burden of establishing by a preponderance of the evidence that the judgment he attacks is void or that his term of imprisonment has expired. *State ex rel. Kuntz v. Bomar*, 381 S.W.2d 290, 291 (Tenn. 1964). If the petitioner fails to establish that his conviction is void or his term of imprisonment has expired, he is not entitled to immediate release. *Passarella*, 891 S.W.2d at 627-28.

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v. State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman v. State*, 153 S.W.3d 15, 19-20 (Tenn. 2004); *Archer*, 851 S.W.2d at 165. The formal requirements for an application or petition for writ of habeas corpus are found at T.C.A. § 29-21-107:

> (a) Application for the writ shall be made by petition, signed by either the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.
> (b) The petition shall state:
> (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and if unknown, describing the person with as much particularity as practicable;
> (2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;
> (3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and
> (4) That it is the first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings there shall be produced, or satisfactory reasons should be given for the failure to do so.

T.C.A. § 29-21-107. A habeas corpus court "may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements . . . ." *Summers*, 212 S.W.3d at 260; *Hickman*, 153 S.W.3d at 21. Because the determination of whether habeas corpus relief should be granted is a question of law, our review is *de novo* with no presumption of correctness. *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000).

Relying on *Summers*, Petitioner contends on appeal that the trial court erred by denying his request for appointment of counsel. While there is no federal or state constitutional right to appointment of counsel in a habeas corpus proceeding, the trial court has a duty to appoint counsel if necessary. *See* T.C.A. § 40-14-204; *Summers*, 212 S.W.3d at 260. However, as noted above, if the petitioner's judgments are facially valid and not void, the trial court may properly dismiss the petition for writ of habeas corpus without appointing counsel and without holding an evidentiary hearing.

Of the three claims raised by Petitioner herein, only one of the claims was cognizable for habeas corpus relief. Petitioner first argues that the district attorney's closing argument essentially amended the indictment which resulted in a "void and unconstitutional" conviction. A review of the record indicates that Petitioner was charged with and convicted of felony murder, premeditated murder and attempted robbery. The judgments attached to the petition for habeas corpus relief are facially valid. Moreover, even if the closing argument somehow resulted in an impermissible

amendment of the indictment, the result would have made Petitioner's judgment voidable rather than void. *See Gary E. Aldridge v. State*, No. M2005-01861-CCA-R3-HC, 2006 WL 1132073, at *3 (Tenn. Crim. App., at Nashville, Apr. 28, 2006), *perm. app. denied*, (Tenn. Nov. 27, 2006).

Next, Petitioner's claim that count three of the indictment was "constructively amended" by the jury because they were permitted to convict him on a "factual basis that effectively modified an essential element of the offense" is not a proper basis for habeas corpus relief. Essentially, Petitioner is arguing that the evidence was not sufficient to support his conviction because there was a material variance between the proof offered at trial and the charged offense. Sufficiency of the evidence is not a proper basis for habeas corpus relief. *Gant v. State*, 507 S.W.2d 133, 136-37 (Tenn. Crim. App. 1973) (sufficiency of the evidence and witness credibility not proper subjects for habeas relief). Moreover, this Court determined on direct appeal that the evidence was sufficient to support Petitioner's convictions. A petitioner may not use habeas proceedings as a means to raise and relitigate issues previously ruled upon. *Id.*

Petitioner's remaining claim, that the indictment for robbery was "void because it did not cite any pertinent statute of robbery" is the only claim that is cognizable in a habeas corpus proceeding. A valid indictment is essential to vest jurisdiction in the convicting court and, therefore, an indictment that is so defective that it fails to vest jurisdiction may be challenged in a habeas corpus proceeding. *State v. Wyatt*, 24 S.W.3d 319, 320-23 (Tenn. 2000). In the case herein, the indictment about which the petitioner complains is attached to the habeas corpus proceedings and is in the record on appeal. The indictment names Petitioner as the accused, the date of the offense, the actus reus, mens rea, and references the statute defining criminal attempt. Given these circumstances, it is clear the indictment is sufficient to vest jurisdiction in the convicting court as the content of the indictment was sufficient to place Petitioner on notice of the nature of the charge, confer jurisdiction upon the trial court and protect against double jeopardy. *See State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000); *State v. Carter*, 988 S.W.2d 145, 158 (Tenn. 1999); *Ruff v. State*, 978 S.W.2d 95, 100 (Tenn. 1998); *State v. Hill*, 854 S.W.2d 725, 728 (Tenn. 1997). Furthermore, a panel of this Court reviewed the indictment and found no error. *Lewis*, 36 S.W.3d at 93-94.

Conclusion

The judgments against Petitioner are not void and his sentence has not expired. Therefore, nogrounds exist which would entitle Petitioner to habeas corpus relief. Thus, the trial court was correct in summarily dismissing Petitioner's habeas corpus petition and refusing to appoint counsel because Petitioner did not allege any facts that justified habeas corpus relief.

Rule 20, Rules of the Court of Criminal Appeals provides *inter alia*:

> The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

> The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge. . . .

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20. We affirm the judgment of the trial court.

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JERRY L. SMITH, JUDGE